

MAR 17 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARCOS VASQUEZ-SALINAS,

Defendant - Appellant.

No. 05-50575

D.C. No. CR-05-00166-GTJ

MEMORANDUM^{*}

Appeal from the United States District Court
for the Southern District of California
Gordon Thompson, Senior Judge, Presiding

Submitted March 8, 2006^{**}

Before: CANBY, BEEZER, and KOZINSKI, Circuit Judges.

Marcos Vasquez-Salinas appeals from his guilty-plea conviction of three counts of entry without inspection, in violation of 8 U.S.C. § 1325(a). This court reviews de novo whether a defendant has waived the statutory right to appeal.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

United States v. Bynum, 362 F.3d 574, 583 (9th Cir. 2004).

Upon review of the record, we conclude that the limited waiver of the right to appeal is unenforceable, as appellant, based upon the plea agreement and plea colloquy, had a reasonable expectation that he would be permitted to appeal his sentence under these circumstances. *See United States v. Buchanan*, 59 F.3d 914, 917-18 (9th Cir. 1995). We therefore have jurisdiction under 28 U.S.C. § 1291 to consider Vasquez-Salinas's claim that the district court abused its discretion by denying his motion to withdraw from his guilty plea. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1117 (9th Cir. 2003) (en banc).

Vasquez-Salinas contends the diminishing vitality of *United States v. Almendarez-Torres*, 523 U.S. 224 (1998), constitutes a "fair and just reason" to withdraw from his plea pursuant to Federal Rule of Criminal Procedure 11(d)(2)(B). However, *Almendarez-Torres* has not been overruled, *United States v. Weiland*, 420 F.3d 1062, 1079, n.16 (9th Cir. 2005), and Vasquez-Salinas has failed to show an intervening change in the law which might plausibly have altered his decision to plead guilty. Accordingly, we conclude that the district court properly found that Vasquez-Salinas failed to present a fair and just reason to withdraw from his plea. *See Reyna-Tapia*, 328 F.3d at 1117.

AFFIRMED.